

D.P.U. 86-DS-117

Adjudicatory hearing in the matter of a possible violation of
General Laws Chapter 82, Section 40, by Masachi Engineering
Corp., Sandwich, MA.

APPEARANCE: Robert Smallcomb
 Division of Pipeline Engineering and Safety
 Department of Public Utilities
 Boston, Massachusetts 02202
 FOR: THE DIVISION OF PIPELINE
 ENGINEERING AND SAFETY

I. INTRODUCTION

On March 3, 1987, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Masachi Engineering Corp. ("Respondent" or "Masachi"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations on December 6, 1986 on Freeman Avenue, Sandwich, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to tender proper notification prior to excavation, causing damage to an underground pipe operated by Colonial Gas Company ("Colonial Gas" or "Company"). The NOPV also stated that the Respondent had the right either to appear before a Department hearing officer in an informal conference on April 7, 1987, or send a written reply to the Department by that date.

On April 2, 1987, the Respondent replied by letter, stating that the damage on Freeman Avenue occurred because neither the gas company workers nor the site plans indicated the correct location of the newly buried line. In a letter dated April 22, 1987, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law, and imposed a \$200 civil penalty on the Respondent. The Division's finding was

based upon the observation that the Respondent had excavated an area knowing of the existence of an unmarked gas main, and relied on site plans rather than proper marking. The Division also informed the Respondent of its right to request an adjudicatory hearing, which the Respondent requested pursuant to 220 C.M.R. § 99.07 (3).

The adjudicatory hearing in this matter was originally scheduled for July 14, 1987. It was rescheduled twice, to October 5, 1988, and then to October 28, 1991 because representatives from Masachi failed to attend the hearings. On October 7, 1991, the Department sent notice of the rescheduled hearing for October 28, 1991 to the Respondent. The Department received a handwritten note with an illegible signature in reply on October 17, 1991. On October 18, 1991, the Department, in a letter, informed the Respondent that, due to the Respondent's lack of cooperation and unresponsiveness, the October 28th hearing date would stand, and if the Respondent did not reply, the appeal would be dismissed and the Dig-Safe fine would be due and payable. The Respondent failed to attend the hearing.

II. STANDARD OF REVIEW

According to Department precedent, if a Respondent fails to appear at a properly noticed adjudicatory hearing, the Department has reason to dismiss the Respondent's case on grounds "that the Respondent has failed to pursue its claim," therefore reinstating

the prior determination of the Division. Signal Construction Company v. Bay State Gas Company, D.P.U. 89-DS-95 (1990); Paul Marusare v. Berkshire Gas Company, D.P.U. 87-DS-85 (1988); Lynch v. Commonwealth Gas Company, D.P.U. 86-DS-70 (1987).

III. ANALYSIS AND FINDINGS

In this case, the Department has followed due process as defined in 220 C.M.R. § 99.00 et seq., by scheduling an informal conference, issuing a remedial order, and then informing the Respondent of its rights to an adjudicatory hearing. The Department also followed due process in holding an adjudicatory hearing as defined in M.G.L. c. 30A, by providing timely notice to the Respondent which stated "that a failure to attend the hearing may result in dismissal of the appeal and enforcement of the [prior informal] decision." Accordingly, because the Respondent failed to appear at the adjudicatory hearing, the Department finds that the Respondent has failed to pursue its claim. Therefore, the Respondent's appeal is dismissed and the prior informal decision is reinstated. The Respondent, however, will be assessed a penalty of \$500.00 and not the \$200.00 assessed in the informal decision since the Respondent is a repeat violator of the Dig-Safe Law. ¹

¹ In a previous decision, the Department found that the Respondent had violated the Dig-Safe Law. Masachi, D.P.U. 89-DS-119 (1991). As of the October 18, 1991 letter from the Department to the Respondent, the Respondent had not paid th is

penalty.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Masachi Engineering Corp. failed to pursue its claim and it is

ORDERED: That Masachi Engineering Corp., being a repeat violator of the Dig-Safe Law, shall pay a civil penalty of \$500 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this Order, and it is

FURTHER ORDERED: That Masachi Engineering Corp. shall pay the \$200 past due civil penalty to the Commonwealth of Massachusetts for its previous violation found in Masachi, D.P.U. 89-DS-119 (1991) by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this Order, if this penalty has not already been paid.

By Order of the Department,